

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MARK HOFFMAN, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

HEARING HELP EXPRESS, INC.,
TRIANGULAR MEDIA CORP.,
LEADCREATIONS.COM, LLC and LEWIS
LURIE,

Defendants.

NO. 3:19-cv-05960-MJP

**REPLY IN SUPPORT OF
PLAINTIFF'S MOTION TO EXTEND
DEADLINE TO SUBMIT EXPERT
TESTIMONY ON WHETHER
DEFENDANT'S DIALING SYSTEM
IS AN ATDS**

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ATDS

CASE No. 3:19-cv-05960-MJP

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I. INTRODUCTION

Defendants do not dispute that good cause exists to extend the deadline to designate an expert on the issue of whether Hearing Help's Genesys dialing system is an automatic telephone dialing system (ATDS) under the TCPA until after the Supreme Court rules on this issue in *Duguid v. Facebook*, No. 19-51 (argued Dec. 8, 2020). Indeed, the parties attempted to resolve this motion by stipulating to a revised case schedule that incorporates Plaintiff's requested relief, but changes other deadlines. The parties could not reach an agreement that provides the Court enough time to rule on dispositive motions before trial. But as Plaintiff describes in his motion, an extension can be granted without changing any of the case management deadlines currently in place including the class certification deadline (February 25, 2021), the dispositive motion deadline (May 27, 2021) and the trial date (November 1, 2021). Defendants fail to offer any argument or analysis to the contrary. Thus, Plaintiff's motion should be granted in its entirety.

II. REPLY FACTS

Defendants did not file an opposition to Plaintiff's motion. Instead, on the date Defendants' responses were due, Hearing Help's counsel notified Plaintiff's counsel that Hearing Help did not formally oppose Plaintiff's requested extension, but instead intended to propose a revised case management schedule "that adds a couple of dates and changes the language of your requested timeline." *See* Declaration of Adrienne McEntee in Support of Plaintiff's Motion to Extend Deadline to Submit Expert Testimony on ATDS Issue (McEntee Decl.), Ex. 1. Plaintiff responded with a proposed revised schedule that built in time for expert depositions and rebuttal experts. *Id.* The parties conferred by telephone and negotiated a schedule that they proposed to the Court that day. Dkt. No. 108.

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The Court denied the parties' stipulated motion without prejudice because the proposed schedule failed to provide sufficient time between the dispositive motion deadline and trial. The Court noted that any renewed stipulated motion must provide at least four months from the date of dispositive motion filings and trial. Dkt. No. 109 at 2. The Court further observed that to the extent any renewed request required a change in the trial date, "the Parties should be aware that the Court's current schedule will not allow for a new trial date until after April 11, 2022." *Id.*

After the Court denied the parties' stipulated motion, Plaintiff proposed a revised schedule to Hearing Help that extended the trial date to April 2022:

EVENT	CURRENT DATE	PROPOSED DATE
JURY TRIAL DATE	November 1, 2021	April 18, 2022 (or judge's discretion)
Plaintiff's reports from expert witnesses under FRCP 26(a)(2) due EXCEPT for witnesses testifying on whether Hearing Help's Genesys system is an ATDS	January 15, 2021	January 15, 2021
Defendants' reports from expert witnesses under FRCP 26(a)(2) due EXCEPT for witnesses testifying on whether Hearing Help's Genesys system is an ATDS	January 15, 2021	February 5, 2021
Deadline to move for class certification	February 25, 2021	February 25, 2021
Plaintiff's rebuttal reports from rebuttal expert witnesses under FRCP 26(a)(2) due EXCEPT for witnesses testifying on whether Hearing Help's Genesys system is an ATDS	No current deadline	February 25, 2021

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EVENT	CURRENT DATE	PROPOSED DATE
Defendants' reports from rebuttal expert witness under FRCP 26(a)(2) due EXCEPT for witnesses testifying on whether Hearing Help's Genesys system is an ATDS	No current deadline	March 15, 2021
Discovery completed by (except for expert discovery)	April 30, 2021	April 30, 2021
All motions related to discovery must be filed by and noted on the motion calendar on the third Friday thereafter (CR 7(d))	May 6, 2021	May 6, 2021
All reports from expert witnesses under FRCP 26(a)(2) due on the ATDS issue	No current deadline	August 6, 2021 (or 45 days following the decision in <i>Duguid v. Facebook</i> , whichever is earlier)
Rebuttal reports from any rebuttal expert witnesses under FRCP 26(a)(2) due on the ATDS issue	No current deadline	August 27, 2021 (or 3 weeks following initial disclosure of expert witnesses on ATDS issue)
Expert discovery cutoff	No current deadline	September 10, 2021 (or 2 weeks following service of rebuttal expert reports on ATDS issue)
All motions related to expert discovery must be filed and noted on the motion calendar on the third Friday thereafter for experts only (<i>see</i> CR 7(d))	No current deadline	September 7, 2021

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EVENT	CURRENT DATE	PROPOSED DATE
Dispositive motion deadline (All dispositive motions must be filed by and noted on the motion calendar for the fourth Friday thereafter - <i>see</i> CR7(d)) Counsel are cognizant of the requirement to provide courtesy copies of any motions with exhibits or other attachments exceeding 50 pages.	May 27, 2021	October 28, 2021
All motions in limine must be filed by and noted on the motion calendar no earlier than the third Friday thereafter and no later than the Friday before the pretrial conference	September 27, 2021	February 17, 2022
Agreed pretrial order due	October 19, 2021	March 11, 2022
Trial briefs, proposed voir dire questions, and proposed jury instructions	October 19, 2021	March 11, 2022
Pretrial conference	October 21, 2021 at 1:30 PM	AT COURT'S DISCRETION
Length of Jury Trial	5-7 days	5-7 days

McEntee Decl., Ex. 1.

Plaintiff and Hearing Help's counsel conferred by telephone regarding Plaintiff's proposal. McEntee Decl. ¶ 3. Hearing Help's counsel refused to agree to Plaintiff's proposal unless Plaintiff agreed to stay all discovery for five months. *Id.* Plaintiff declined to accept

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Hearing Help's position, noting that his motion for class certification was due on February 25, 2021, discovery pertinent to that motion remained outstanding. *Id.*

I. REPLY ARGUMENT

"[I]f a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." LCR 7(b)(2). Defendants did not oppose Plaintiff's motion. Under the Local Rules, Plaintiff's motion should be granted.

Because the parties could not reach agreement on a proposed revised schedule that maintained four months between the dispositive motion deadline and trial as the Court ordered, Plaintiff respectfully requests that the Court enter the schedule that Plaintiff requested in his motion.

EVENT	DATE
Reports from expert witness under FRCP 26(a)(2) due EXCEPT FOR witnesses testifying on whether Hearing Help's Genesys system is an ATDS	January 15, 2021
Deadline to move for class certification	February 25, 2021
Reports from expert witnesses under FRCP 26(a)(2) on the ATDS issue	August 6, 2021 or 30 days following the Supreme Court's decision in <i>Duguid v. Facebook</i> , whichever is earlier
JURY TRIAL DATE	November 1, 2021

See Dkt. 107 at 2.

Defendants do not dispute that good cause exists to extend the deadline to designate an expert on the ATDS issue until after the Supreme Court issues its ruling in *Facebook*. Any decision the Court issues will very likely bear on the criteria that Plaintiff's expert will use to evaluate whether Hearing Help's dialing system is an ATDS. Plaintiff's request is particularly

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reasonable because it maintains the current case management schedule—including the current class certification deadline, dispositive motion deadline, and trial date—and at the same time allows the parties to exchange expert reports on the ATDS issue after the Supreme Court’s decision in *Facebook*, but well in advance of trial.

II. CONCLUSION

For all these reasons, Plaintiff respectfully requests that his motion to extend the expert deadline on the ATDS issue be granted and the case management schedule be modified as follows:

EVENT	CURRENT DATE	PROPOSED DATE
Reports from expert witness under FRCP 26(a)(2) due EXCEPT FOR witnesses testifying on whether Hearing Help’s Genesys system is an ATDS	January 15, 2021	January 15, 2021
Reports from expert witnesses under FRCP 26(a)(2) on the ATDS issue	January 15, 2021	August 6, 2021 or 30 days following the Supreme Court’s decision in <i>Duguid v. Facebook</i> , whichever is earlier

1 RESPECTFULLY SUBMITTED AND DATED this 8th day of January, 2021.

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